84-1713

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LEONA BRENNER,
Petitioner

V.

UNIVERSAL-RESILITE COMPANY,
Respondent

A P P E N D I X
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 84-1382

LEONA BRENNER,
Plaintiff, Appellee

v.

PRESIDENT AND FELLOWS OF
HARVARD COLLEGE, ET AL,
Defendants, Appellees

UNIVERSAL-RESILITE COMPANY
Defendant, Appellant

ORDER OF COURT
Entered: April 10, 1985

Upon consideration of the motion of Leona Brenner to recall mandate, It is ordered that said motion be, and the same hereby is, denied.

By the Court:
/s/ Francis P. Scigliano
Clerk

CC: Messrs. Wood, Brown and Featherston

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 84-1382

LEONA BRENNER,
Plaintiff, Appellee

V.

PRESIDENT AND FELLOWS OF HARVARD
COLLEGE, ET AL
Defendants, Appellees

UNIVERSAL-RESILITE COMPANY,
Defendant, Appellant

NO. 84-1393

LEONA BRENNER,
Plaintiff, Appellant

V.

PRESIDENT AND FELLOWS OF HARVARD
COLLEGE, ET AL.,
Defendants, Appellees

ORDER OF COURT
Entered: March 19, 1985

By denying the motion of Leona Brenner to recall mandate, the Court in effect has denied the "Petition for Rehearing In Banc"

and "Plaintiff's Alternative Petition For Partial Rehearing".

By the Court:

/s/ Francis P. Scigliano

Clerk

CC: Messrs: Wood, Featherston and Brown

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 84-1382

LEONA BRENNER,
Plaintiff, Appellee

V.

PRESIDENT AND FELLOWS OF HARVARD
COLLEGE, ET AL,
Defendants, Appellees

UNIVERSAL-RESILITE COMPANY,
Defendant, Appellant

NO. 84-1393

LEONA BRENNER,
Plaintiff, Appellant

V.

PRESIDENT AND FELLOWS OF HARVARD
COLLEGE, ET AL,
Defendants, Appellees

ORDER OF COURT
Entered: February 27, 1985

Upon consideration of the motion of plaintiff, Leona Brenner, to recall mandate in the above-captioned cases,

It is ordered that said motion be, and the same hereby is, denied.

By the Court:

/s/ Francis P. Scigliano

Clerk

CC: Messrs. Featherston, Brown and Wood

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 84-1382

LEONA BRENNER
Plaintiff, Appellee

V.

PRESIDENT AND FELLOWS OF HARVARD
COLLEGE, ET AL,

UNIVERSAL-RESILITE COMPANY,
Defendant, Appellant

MEMORANDUM AND ORDER
Entered: January 30, 1985

Per Curiam. Plaintiff's motion to recall mandate is denied. While the January 11th order may be on a "newly relied-upon" issue, it is not a new issue, but one argued before. More to the point, the court is not persuaded by the amplification. The enormous inadequacy of the jury's damage finding shows that something was awry. At the same time, the court wishes to

correct an assumption in the petition. The November 19th opinion "demonstrates" nothing beyond what was recognized in the January 11, 1985 memorandum and order. The court issued that document for the very reason that the motion for reconsideration had caused it to re-examine the initial opinion and it chose this new approach rather than reach a final conclusion as to the correctness, vel non, of what had been questioned by that motion.

By the Court:

/s/ Francis P. Scigliano

Clerk

CC: Messrs. Featherston, Wood and Brown

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

LEONA BRENNER,
Plaintiff, Appellee

V.

PRESIDENT AND FELLOWS OF
HARVARD COLLEGE, ET AL,
Defendants, Appellees

UNIVERSAL-RESILITE COMPANY,
Defendant, Appellant

NO. 84-1382

PLAINTIFF-APPELLEE'S PETITION FOR PARTIAL REHEARING[1]

Plaintiff is again constrained to move for rehearing in the above-captioned matter, because of the court's Memorandum and Order of January 11, 1985. The court's new rationale for a new trial on the ground of a "compromise verdict" is not

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[1]Plaintiff specifies a "partial rehearing" because she again addresses only the new trial ordered by the court on breach of warranty against URC, and none of the issues in her cross-appeal, No. 84-1393.

a legally viable alternative for several reasons, and the fact that the court "overlooked" or "misapprehended" these reasons makes the instant petition, unfortunately, all too appropriate. F.R.A.P. 40.

Although the court obviously recognized the validity of appellee's argument in her previous petition regarding URC's liability, to the extent that it withdrew its November 19th opinion, it reaches the same result by accepting an argument it had previously rejected, and one, therefore, which was not addressed in appellee's first petition--that the jury's low damage award demonstrates that the liability verdict was arrived at by means of an improper "compromise."[2] Putting considerations of equity aside for the moment, it is

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[2]The court's recognition that URC's established liability is unassailable, implied within the withdrawal of its opinion, of course, removes the premise underlying the court's hypothesized compromise verdict on liability.

clear that the court's order on this "new" ground cannot stand as a matter of law.

The order violates long-established principles because it has not been held, nor can it be, that the lower court's allowance of a new trial on damages only, and its related determination that no "compromise verdict" here occurred, was "an abuse of discretion." That is the mandated standard of appellate review necessary to the court's result. In fact, the court's conclusion that the jury's decision was a "compromise verdict" is based on sheer speculation--rather than the requisite "clear demonstration in the record"--and as such does not meet the governing standard of proof, let alone of review. Since, as this court's November 19th opinion itself demonstrates, the compromise verdict theory is only one of several possible explanations of what

happened in this case, it cannot defeat the presumption that the jury's liability verdict was valid and the partial new trial on damages proper.[3] That most compelling conclusion about this case--that the evidence mandated a finding of liability on the part of URC, regardless of the jury's separate problem with damages--has been overlooked by this court. These omissions require that the court grant this petition and affirm the lower court's judgment, or at least permit further briefing on this newly relied-upon issue.

In order to make appellee's argument crystal clear, a brief review of the lower court's rulings on plaintiff's motion for a new trial is necessary. Throughout its

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[3]That partial new trial, of course, ended up as a jury-waived assessment of damages by the court, from which judgment URC appealed.

memorandum and order, the court recognized the fundamental validity of the jury verdict which "found URC liable for failing to adequately warn." (A. 65). Judge Tauro clearly recognized the strong evidentiary basis for such a finding, as is indicated in its ruling on one of plaintiff's arguments for a new trial not here in issue: "The evidence as to URC's knowledge of the potential danger of using non-Universal keys was far stronger than that offered against either UGEI or Whittaker. Moreover, the jury could have based its liability finding on the evidence of URC's ineffectual attempts to supply warnings to users of their machines" (A. 69-70). Since the plaintiff was thus "successful in her

breach of warranty claim against URC" (A. 71)[4], the court, in its discretion, ordered a partial new trial because of inadequate damages, stating:

> "Ordinarily, the court will not disturb a jury determination of a damage award. But when such an award constitutes a miscarriage of justice, a new trial is mandated. It is clear that the jury did nothing more than award Brenner her medical expenses, ignoring completely the compelling and overwhelming evidence concerning paid, disability and disfigurement. It would be a miscarriage of justice to permit such a grossly inadequate award to stand." (A. 72)

In making that ruling, the lower court properly utilized its discretionary power to grant a partial new trial limited solely to the issue of damages, implicitly

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[4]This was, of course, by proper application of the case of Correia v. Firestone Tire & Rubber Co., 388 Mass. 342 (1983), which removed contributory negligence as a bar to recovery for breach of warranty. Thus the jury's finding of 95% contributory negligence, insofar as it was urged by URC to be indicative of a compromise verdict, has nothing to do with this issue as it cannot infect URC's liability for breach of warranty.

determining that the issue was sufficiently distinct and independent from the established liability aspect of the case that it could be tried separately without injustice. Fed. R.Civ.P. 59(a). See generally 6A Moore's Federal Practice, §59.06. In this regard, the case of Yates v. Dann, 11 F.R.D. 386, 392-394 (Del. 1951), is precisely on point. In that personal injury action, where the jury rendered a verdict for the plaintiff but awarded inadequate damages, the court stated:

> "Under Fed.RulesCiv.Proc.rule 59,...the trial judge has discretion to order a partial new trial as to one or more issues where it appears the issue in question is severable from and not interwoven with the remaining issues. The theory behind this rule is a party who has already had his day in court as to a particular issue may not have another opportunity to re-litigate the same point unless a partial new trial will result in a miscarriage of justice. I think F.R. 59 was intended to prevent the retrial of any issue already properly decided, and to limit any new trial only to those issues which are incorrectly decided

> or not decided at all. Since the adoption of the Federal Rules of Civil Procedure, courts have indicated a trend to limiting retrials to specific issues whenever possible, particularly in personal injury cases where the issue of damages is independent from that relating to liability....
>
> "...Defendant, here, has had a fair trial on the issue of liability and it would be, I think, obviously grossly unfair to plaintiff, as well as contrary to the spirit of F.R. 59, to require a retrial of the question of defendant's culpability which has already been decided by the jury in plaintiff's favor. Moreover...a grave injustice would occur to a plaintiff if, having submitted the question of liability to a jury, and having obtained a favorable verdict, a plaintiff should be compelled to risk another trial, with a possibility of an adverse verdict, solely because a jury failed to take into consideration all of the elements of damages as clearly instructed by the court." (Emphasis added)

The use of a partial new trial on damages has been upheld in many cases, where the damage issue is not interwoven with the liability issue, the verdict on which was

supported by sufficient evidence. See, e.g., Hadra v. Herman Blum Consulting Engineers, 632 F.2d 1242 (5th Cir. 1980), cert. denied, 451 U.S. 912 (1981); Great Coastal Express, Inc. v. International Brotherhood of Teamsters, 511 F.2d 839 (4th Cir. 1975), cert. denied, 425 U.S. 975 (1976). The classic Supreme Court case in this area, Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931), thoroughly supports the trial court's action here, for it states that "where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again." Id. at 499. In that contract case, however, a decision as to the amount of damages on the counterclaim would have required the jury to refind the terms of the contract and its

dates of formation and breach--a redetermination of the liability issue which precluded an independent damages trial.[5] Here, as the lower court knew, URC's liability was an issue entirely distinct from that of damages, as is the norm in personal injury litigation.

This court long ago recognized the "salutary" practice of a limited-issue new trial, and the fact that it is a "question of discretion" for the trial court. Calaf v. Fernandez, 239 F.795 (1st Cir. 1917). Thus, it is well-established that "[a] motion for a new trial on the grounds of inadequate...damages is addressed to the discretion of the trial court, and its

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[5]The issues of liability and damages on the counterclaim were thus so "interwoven" that they could not be resolved separately without confusion and uncertainty. In contrast, it is worth noting that the court did separate and let stand the verdict for the plaintiff on the contract sued upon without a new trial.

decision may be reversed only for an abuse of that discretion." Stafford v. Perini Corp., 475 F.2d 507, 512 (1st Cir. 1973), citing Boston & Maine Railroad v. Talbert, 360 F. 2d 286 (1st Cir. 1966), New York, N. H. & H. R. Co. v. Zermani, 200 F.2d 240 (1st Cir. 1952), cert denied., 345 U.S. 917 (1953). Per this court's own decisions, very rarely can it be said that the lower court has clearly erred or abused its discretion in granting such a new trial. See Moore, supra, §59.08[6] at 59-168 and 59-178, and cases cited therein. Yet the court now assumes, without deciding, that the lower court committed such blatant error.

The lower court's granting of a new trial on damages, and its subsequent denial of URC's "Motion For Reconsideration" of that ruling on the ground of a compromise verdict (A. 58) reflected its determination that URC's liability for breach of

warranty for failure to warn had been properly determined by the jury. It made its decision rejecting the compromise verdict hypothesis after considering memoranda filed by both parties. Such a decision is also reviewed under an "abuse of discretion" standard, and the granting of a new trial on damages only is consistently upheld by Federal appellate courts "unless the record clearly demonstrates[s] a compromise judgment." Nat. R. R. Passenger Corp v. Koch Industries, Inc. 701 F.2d 108 (10th Cir. 1983) (emphasis added), citing Luria Brothers & Co. v. Pielet Brothers Scrap Iron & Metal, Inc., 600 F.2d 103, 115 (7th Cir. 1979); Maher v. Isthmian Steamship Co., 253 F.2d 414, 419 (2d Cir. 1958). As rare as it is for a court to find that the lower court has abused its discretion in granting a partial new trial, research discloses that this court has never

before reversed the trial court, on the ground that a compromise verdict nullified the judgment. In fact, in Decato v. Traveler's Insurance Co., 379 F.2d 796, 798 n. 8 (1st Cir. 1967), the court showed great deference to the lower court's ruling which implied a finding that the verdict was not a compromise, stating it "ha[d] no reason to disagree."

Notwithstanding the obvious rarity of a warranted compromise verdict finding, this court apparently has overlooked the requisite standard of review and the fact that this record does not in any sense "clearly demonstrate" a compromise verdict. Its subject Memorandum and Order contains no discussion of the "abuse of discretion" standard by which the lower court's ruling must be judged, or of the legally competent proof of such a verdict necessary to satisfy that strict standard. It indicates only that the majority of judges somehow now

believe that the jury arrived at its verdict by an illegal compromise. But the court does not, and cannot, hold that the lower court erred as a matter of law in finding that there was no compromise, because the record, as the court's opinion of November 19th itself establishes, permits of other interprepations.[6] Under these circumstances, the court's present decision to order a new trial because of a compromise verdict rests on speculation--inappropriate, and insufficient to overturn the lower court's resolution of the matter.

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[6]The majority stated: "URC contends that the jury found it free from fault and the plaintiff wholly to blame but wishing to reimburse the plaintiff for her medical expenses compromised by finding her 95% contributorily negligent. Plaintiff argues that this was not a compromise verdict, that the jury determined the actual damages to be $100,000 and then deducted 95% to reflect its finding on contributory negligence. There is a third possibility, the jury understood full well the instructions and questions on damages and decided that $5,000 was the full measure of plaintiff's damages" (Slip. Op. at 10-11).

These principles are reflected in several relevant opinions on this subject. In Kingsport Utilities, Inc. v. Lamson, 257 F.2d 553, 559 (6th Cir. 1958), the court noted the rule on compromise verdict set out in Simmons v. Fish, 210 Mass. 563, 97 N.E. 2d 102 (1912). It continued, however:

> "On the other hand, most verdicts are the product of some give and take and such interchange of ideas as is necessary to arrive at a common understanding. A verdict reached through such open minded discussion between jurors with a proper regard for the opinions of others, is not invalid, provided the final result, after it is reached, is conscientiously approved by the jurors as a fair and just verdict...The presumption is always in favor of the validity of a verdict, if it is the result of an honest judgment."[7]

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[7] The presumption of validity afforded a verdict is well-recognized. See, also Great Coastal Express, Inc., supra, at 846, and cases cited. On the other hand, there is no "presumption" in favor of a compromise verdict. See, e.g.

In Maher v. Isthmian Steamship Co., 253 F.2d 414 (2d Cir. 1958), the court rejected a "compromise verdict" argument, even though the jury in that personal injury

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Footnote 7 Continued

Luria Bros., supra, at 115 ("there is no presumption that a verdict of approximately half the lost profits shown in the evidence is a compromise on the issue of damages and liability"). The closest the courts come to such a presumption is when they infer an obvious compromise verdict "when the plaintiff sues for a liquidated sum, as for money due under a contract, where the only defense is a denial of the obligation, and the verdict for the plaintiff is in an amount substantially less than that claimed." Maher v. Isthmian Steamship Co., supra, at 417. In those cases there is a clear inconsistency between the verdict and the facts addueced at trial. Id. at 416. While suspicions perhaps may be aroused where a jury awards low damages, as the case of Simmons v. Fish, supra suggests, "a grossly inadequate award of damages aby itself does not require retrying the liability issue...." Nat. R. R. Passenger Corp., supra at 110. This is not a case satisfying the Simmons v. Fish definition of compromise, where "it appears that no jury had ever decided [the liability] issue against [URC] on justifiable grounds", 210 Mass. at 572, as is demonstrated herein. The Simmons v. Fish opinion itself recognizes the importance of preserving a verdict upon which no illegality can be shown, and separating out the verdict which is the result of illegality for a partial new trial. Id. at 565-568. The court's Memorandum and Order does not explain how the presumption of validity afforded the liability verdict here was, somehow, overcome.

action had reported themselves "hopelessly deadlocked" approximately an hour before they ultimately reached their verdict. Noting that "one inference is as good as another" when it comes to explaining what was in the jurors' minds, the court concluded

> "There was clear-cut issues on the subject of the injuries, the pain and suffering, and especially on the critical question of contributory negligence. On each of these issues the credibility of plaintiff was necessarily involved. In applying the rule of comparative negligence any number of rational conclusions, in one combination or another, could have resulted in the verdict as rendered. We can find no basis whatever for the claim that this verdict was arrived at by means of any improper compromise; nor does the well-settled principal above discussed permit us to indulge in speculation and guesswork, for which there is no support in the record...."

Id. at 419. See also Luria Bros & Co. v. Pielet Bros Scrap Iron, 600 F.2d 103 (7th Cir. 1979). In all of these cases,

as here, the evidence had presented a strong showing as to the liability of the particular defendant, which negated the possibility of a compromise verdict. The record does not clearly disclose the fact of a compromise, which it must, if the court's decision is to stand.

The fact that this court is indulging in speculation, eschewed by the district court, is apparent in light of the existence of alternative explanations for the jury's result, as admitted by the court in its withdrawn opinion. See footnote 6, supra. Now the court only sees two possibilities, mentioned in its Memorandum and Order, both of which reflect an invalid compromise on the part of the jury.[8] But the court overlooks the most compelling

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[8] "Either all the jurors felt defendants were not really at fault, but wanted to give her her medicals, and had to find liability in order to support the handout, or the majority of jurors were basically unwilling to find any liability at all, but had to accommodate one or more plaintiff supporters."

alternative here--that the evidence mandated that URC was at fault for breach of warranty for failure to warn, or, at the very least, did nto entail a compromise to so determine, and therefore liability was plainly established, uninfected with any compromise. Then, for whatever separate reason, be it the "full award theory" suggested by the majority in the November 19th opinion, or any jury motive for not wanting to give the plaintiff more than $5,000, the jury awarded inadequate damages. Regardless of the explanation for the actual amount, th liability verdict on the special question for failure to warn remained intact and suported the evidence. That fact, which the lower court recognized in ordering the partial new trial on damages, is completely disregarded by this court.[9] It is also very

[9]This is so despite the fact that the majority in the earlier opinion noted the soudness of the jury verdict on URC's liability:

significant that URC has never dared argue to this court that there was insufficient evidence to establish its liability for failure to warn. Now, however, the court, with no analysis of the issue, no deference to the trial court's ruling, and no explanation of why its previous holding is invalid as a matter of law, now deprives the plaintiff of the liability verdict rendered against URC for breach of warranty. It does so despite the fact that the day before it issued its Memorandum and Order in the subject cause, the court stated in Goeken v. Kay, ___F.2d___ (No. 84-1398), January

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Footnote 9 continued
"The jury answers on the negligent liability claims are clear, consistent and supported by the evidence. It found URC negligent for failing to give adequate warning concerning the use of ~~non~~-Universal pins. Its failure to find Whittaker and/or UGEC liable on the same basis reflects the evidence that neither Whittaker nor UGEC had any dealings with Harvard and that URC was the one responsible for the maintenance of the machine (Slip Op. at 9-10).

10, 1985) that "it is the jury's 'special verdict' findings of fact, not its views of what legal conclusions follow from those facts, which the courts treat with deference."

The court's conclusory decision that a "compromise verdict" was rendered herein on liability runs afoul of Justice Brandeis' admonition in Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 485 (1933), that "[a]ppellate courts should be slow to impute to juries a disregard to their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct." In the absence of any showing of "abuse of discretion", the lower court's decision must stand.

The result which appellee urges is mandated here as a matter of law, is also consistent with fairness and judicial economy. In its resolution of this case, the lower court had in mind considerations

of justice and finality disregarded by this court in its determination that a new trial be held. It cannot meet either legal or equitable standards for plaintiff to have to retry her case for a reason once found nonexistent by a majority of this court. The court is importuned to reconsider its apparent belief that this case must be retried, when, legally and pragmatically, such a retrial is not necessary.

By her attorneys,

/s/ Daniel F. Featherston, Jr.

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DATED: January 25, 1985

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 84-1382

LEONA BRENNER,
Plaintiff, Appellee

V.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE, ET AL,
Defendants, Appellees

Before
Bownes, Circuit Judge,
Aldrich and Skelton*, Senior Circuit Judges

MEMORANDUM AND ORDER
Entered: January 11, 1985

Per Curiam. Appellee's petition for rehearing, contending that the court's opinion of November 19 ordering a new trial on the issue of URC's liability was based upon errors of substantive law, has persuaded the majority judges, without their making a final decision on those questions, to adopt concurring Judge Aldrich's alternative ground for ordering the new trial.

*Of the Federal Circuit, sitting by designation.

The jury's finding damages in the amount of $5,000 (approximately the amount of the medical bills) was inadequate beyond any possibility of rational explanation. We say this quite apart from the court's ultimate $175,000 assessment. We do not agree with plaintiff's claim that the jury, without instruction, and sua sponte, applied its finding of 95% contributory negligence to an initial finding of $100,000 in damages and reported the result as "plaintiff's damages." Obviously, the court did not agree, either, or it would not have ordered a new trial on damages because of the $5,000's inadequacy.

Under these circumstances, there remained two alternatives. Either all the jurors felt defendants were not really at fault, but wanted to give her her medicals, and had to find liability in order to support the handout, or the majority of the jurors were basically unwilling to

find any liability at all, but had to accommodate one or more plaintiff supporters. Whether compassion or compromise, and more than likely it would be the latter, the verdict was inescapably a miscarriage of justice, and the finding of liability, as well as the damage assessment, must be vacated. Southern Ry. Co. v. Madden, 235 F.2d 198, 202 (4th Cir. 1956); Simmons v. Fish, 210 Mass. 563, 97 N.E. 102 (1912). There need be no new trial with respect to the negligence liability of Harvard because the warranted 95% contributory negligence finding negates such liabili For the same reason, a new trial is precluded against URC on the negligent failure to warn claim. URC, however, must be given a full new trial as to liability and damages on the breach of warranty of merchantability claim whether or not the court was correct in its substantive rulings. And for the

reasons stated in our previous opinion, plaintiff is entitled to a new trial against URC on her claim of negligent inspection and repair.

The petition for rehearing is otherwise denied.

It is ordered that our previous opinion be withdrawn from publication.

By the Court:

/s/ Francis P. Scigliano

Clerk

CC: Messrs. Wood, Brown and Featherston

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

LEONA BRENNER,
Plaintiff, Appellee

V.

PRESIDENT AND FELLOWS OF
HARVARD COLLEGE, ET AL,
Defendants, Appellees

UNIVERSAL-RESILITE COMPANY
Defendant, Appellant

NO. 84-1382

PLAINTIFF, APPELLEE'S
PETITION FOR REHEARING AND
PETITION FOR PARTIAL REHEARING IN BANC

The court is assured that this is not the routine petition for rehearing all too instinctively filed by a losing party. Inexplicable and far-reaching errors of law invalidate the court's opinion and mandate correction.

The new trial ordered by the court is foreclosed for several dispositive reasons, and the court's opinion demonstrates that these matters were, somehow, "overlooked

by the court. F.R.A.P. 40, therefore, makes this petition the proper vehicle of correction. Because both of the court's alternative new trial holdings are also contrary to previous decisions of this court, R.F.A.P. 35 authorizes in banc rehearing, so that the court may "maintain uniformity of its decisions.[1]

The court holds, in essence, that a new trial is required for two reasons: first, that the jury only decided that there was a negligent failure to warn by URC, and that under Massachusetts law that was an insufficient basis for the trial judge to enter judgment against URC on the separate theory of breach of implied warranty for failure to warn; and, second, that "URC was not given an opportunity to raise" the misuse aspect of breach of implied warranty", which "defense of misuse" could be viable on the evidence. (Slip Opinion p. 12). In propounding

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[1]Plaintiff specifies a "partial rehearing" because she addresses herein only the two bases assigned by the court for a new trial ordered.

its first reason, however, the court, somehow, overlooked the latest binding decision of the Massachusetts Supreme Judicial Court, Hayes v. Ariens Co., 391 Mass. 407, 462 N.E. 2d 273 (1984), which is directly in point and directly contrary to this court's holding, and also overlooked the fact that URC specifically conceded that that case here renders it liable for breach of warranty. The court's second reason for a new trial--that "URC was not given an opportunity to raise... misuse"--overlooks the fact that URC waived that long-established "defense" in the lower court and also overlooks that the legal elements of "misuse" are impossible to find on this evidence as a matter of law. Both of the court's reasons for a new trial are not only contrary to quite specific controlling Massachusetts law but also contrary to this court's own decisions, so in banc rehearing is required.

Footnote 1 continued
Neither the issues subtended by her cross-appeal in No. 84-1393, nor URC's other arguments for reversal are here involved.

1. Massachusetts law required the judgment for breach of implied warranty when the jury found there was a negligent failure to warn.

The court found that "the case was submitted to the jury and decided by it only on negligent failure to warn" (Slip Opinion, p. 9), and that it was "error for the district court to find [or "rule" (Slip opinion, p. 8)] that there was a breach of implied warranty by URC on the basis of the jury negligence findings" because Correia v. Firestone Tire & Rubber Co., 388 Mass. 342, 466 N.E. 2d 1033 (1983), requires that "the jury must be instructed on both theories and separate questions on each theory submitted to them" (Slip opinion, p. 11), so there must be a new trial. Eights months after Judge Tauro equated the jury's verdict of a negligent failure to warn which a breach of implied warranty for failure to warn, and ruled that URC was

liable on the latter theory, the Massachusetts Supreme Judicial Court handed down its opinion in Hayes v. Ariens Co., 391 Mass. 407, 462 N.E. 2d 273 (1984). That case, which is, of course, binding on this court, establishes absolutely that Judge Tauro was correct, albeit, presciently, in ruling that URC was liable for breach of warranty--that there was no "error" at all. This court's opinion overlooked, however, the dispositive Hayes decision--did not even cite the case in its opinion--even though both parties cited it in their briefs. In Hayes, as here, the plaintiff claimed that he was injured because "the defendant failed to warn", both as negligence and breach of implied warranty, the case was also submitted to the jury on special questions, and the jury found that the defendant was negligent but found that it did not breach its warranty. The

trial judge entered judgment for the defendant (because the jury had found the plaintiff 60% contributorily negligent), but the Supreme Judicial Court reversed , holding, in part, Id. at 410, 462 N.E. 2d 274:

> "...A defendant in a products liability case in this Commonwealth may be found to have breached its warranty of merchantability [for failure to warn] without having been negligent, but the reverse is not true. A defendant cannot be found to have been negligent [for failure to warn] without having breached the warranty of merchantability." (Emphasis supplied.)

Even if Judge Tauro erred, therefore, in presenting the common issue of fact to the jury as he did, and not on "spearate questions" as the court"s opinion would have it, it was "harmless error", if you will. Hayes mandates the breach of warranty liability from the negligence finding. This court recognized that this jury "found URC negligemt for failing to

give adequate warning" (Slip opinion, p. 9), and Hayes establishes that Judge Tauro's equating that jury finding with breach of warranty was exactly reflective of Massachusetts law (and, in fact, the general law of products liability) now binding on this court. The "error" was not Judge Tauro's but this court's overlooking Hayes.

Hayes, is so dispositive, in fact, that URC conceded that Hayes established its liability for breach of warranty for failure to warn! This court, somehow also overlooked that specific formal admission by the defendant, an equally dispositive reason to affirm the judgment and not order a new trial.[2] In the third

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[2]It should, perhaps, be noted that the Supreme Judicial Court was constrained to order a new trial in Hayes, rather than enter judgment for the plaintiff, because it was presented with the jury's answers to specific questions which were held to be fundamentally inconsistent. The record did not permit judgment on such findings, but this jury's answers to the single relevant question about failure to warn did not similarly constrain either the trial judge or this court.

paragraph of its brief in chief, ps. 8-9, the defendant specified that concession as follows:

> "...The recent decision in Hayes v. Ariens Co., 391 Mass. 407 462 N.E. 2d 273 (1984) has effectively upheld the trial judge's deductive reasoning in this regard ['equat(ing) the jury's findings of negligence on Resilite's part with a finding of breach of implied warranty']. Hayes makes it clear that in a products liability action based upon a theory of failure to warn, a finding of negligent failure to warn necessarily imports that sufficient warnings were not given by the negligent defendant at the time he sold the product. Id. at 410, 462 N.E. 2d at 275. The finding of negligence also constitutes a statement by the jury that the product was unreasonably dangerous when sold, due to the lack of adequate warnings, and that determination 'cannot be reconciled with [a] finding that there was no breach of warranty.' Id. at 412 462 N.E. 2d at 276."

That clear and specific admission by URC that Hayes dispositively established its breach of warranty liability simply cannot be overlooked by this court--"that issue has been eliminated from the case because [URC] concedes [it] in [its] brief...."

Young v. Mobil Oil Corporation, 4 Mass. App Ct. 805, N.E. 2d ____(1976); See, Donovan v. Wilson Sporting Goods Co., 285 F.2d 714, 176 (1st Cir. 1961); 36 C.J.S. §297 (80). Were the concession foolish or errant, the court could ignore it, of course, to remedy "plain error" or secure justice, but this concession is not errant. It simply recognizes the result Hayes requires and justice is, of course, served thereby, in t it results in the plaintiff receiving deserved compensation for her serious injuries (injuries, interestingly, un-specified in the court's opinion).[3]

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[3]It should also be noted, perhaps, that URC was well aware of the fact that it was conceding an issue of fundamental importance. It was the whole basis of its argument to Judge Tauro that the negligent failure to warn finding did not result in its implied warranty liability. Its lengthy memorandum of law and its oral argument to that effect are not part of the record in this court, but Judge Tauro's careful Memorandum establishing URC's liability reflects clearly that that was the thrust of URC's argument below (A. 63-69). URC was, quite knowingly, conceding that Hayes "blew it out of the water."

Thirdly, even without Hayes or the URC concession of liability in its brief, the court also overlooked the fact that URC waived in the lower court any error in sending the case "to the jury on two legal theories based on a common factual issue", as Judge Tauro put it (A. 64). Not only does the record transcript establish URC's assent to the method of presentation chosen by the trial court (A. 851-871; 993-1012; 1016-1043), Judge Tauro specifically found that there was multiple waiver.[4] A skein of this court's decisions establishes that when no objection was raised at trial it "precluded consideration of this issue", McKinnon v. Skil Corp., 683 F.2d 270 at 273 (1st Cir. 1981), and the

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[4] "...Certainly, the breach of warranty claim could have been discussed independently and explicitly. But, at the time, no objections were raised to the court's determination that independent instruction on the warranty issue was unnecessary. Moreover, no objection on that point was raised with respect to either the court's instructions or the interrogatories submitted to the jury." (A. 68)

court "will not reverse a judgment of the district court on a ground not urged upon or considered by it." Dobb v. Baker, 505 F.2d 1041 at 1044 (1st Cir. 1974).[5] For this court to overlook its own long-established rule of law that URC's waiver "precluded consideration of this issue" and order a new trial anyway does not, of course, "maintain uniformity of its decisions", F.R.A.P. 35, and is another example of why in banc rehearing is required. Admittedly, this particular overlooking of the waiver issue is understandable, because the plaintiff relied in her briefs upon URC's specific concession that Hayes established its liability for breach of warranty--there was no need

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[5] See also, Hormel v. Helvering, 312 U.S. 552 (1941); Roy v. Star Chopper Co., 584 F.2d 1124, 1132 (1st Cir. 1978) cert denied, 440 U.S. 916 (1979 Morris v. Travisono, 528 F.2d 856, 859 (1st Cir. 1976); Nimrod v. Sylvester, 369 F.2d 870, 872 (1st Cir. 1966); Roto-Lith, Ltd v. F.. P. Bartlett & Co., 297 F.2d 497, 500 (1st Cir. 1962); and Bird v. United States, 241 F.2d 516, 520-521 (1st Cir. 1957).

to allude to URC's lower court waiver and Judge Tauro's specific finding of waiver (which finding cannot, of course, be ignored by this court unless "clearly erroneous"--here, impossible to find on this clear record).[6]

Before leaving this point, it may be well to assure the court that when Judge Tauro deduced URC's implied warranty liability from the jury's failure to warn finding, then established as the binding rule of law by Hayes, neither is a legal aberration. It is generally recognized that "failure to warn" is "a common factual issue", as Judge Tauro termed it (A. 64), whether the rubric be negligence or warranty, and that a separate

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[6]This whole issue, in fact, was not briefed by the parties, so should the court not find the contents of this petition sufficiently compelling to withdraw its new trial opinon and affirm, it should, at the very least, order the matter to be fully briefed (and, perhaps, argued).

instruction is unnecessary.[7] For the sake

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[7] One of the clearest explications of this unity or commonality was last year set out by the Sixth Circuit in Miller v. Caterpillar Tractor Co., 697 F.2d 141 at 146 (6th Cir. 1983), wherein the court noted the jury instruction on negligent failure to warn, and continued:

> "...A similar [failure to warn] instruction was not provided under the charge relating to implied warranty. However, the Michigan Supreme Court [Michigan law being applicable] has observed that while negligence and implied warranty, are distinct causes of action,
>
> > "when the factual issue is not whether the product itself is defective, but is whether the manufacturer has provided adequate warnings, the existence of a product defect and a breach of duty is determined by the same standard--reasonable care under the circumstances.*** On the facts, therefore, the two theories involve identical facts and require proof of exactly the same elements. This is true because the focus is upon the adequacy of the warnings regardless of the theory of liability.
> >
> > ***
> >
> > Consequently, when liability turns on the adequacy of a warning, the issue is one of reasonable care, regardless of whether the theory pled is negligence, implied warranty or strict liability in tort.'

of this argument, so far, plaintiff accepted this court's interpretation that Correia's "admonition that negligence and implied warranty should be treated separately" "can only mean that...the jury must be instructed on both theories [of negligent failure to warn and implied warranty] and separate questions on each theory submitted to them." (Slip opinion p. 11) Even an indulgent reading of Correia could not spawn such a conclusion,

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Footnote 7 continued

> Smith v. E. R. Squibb & Sons, Inc., 405 Mich. 79, 273 N.W. 2d 476, 480 (1979) (original emphasis). Accordingly, it appears that Caterpillar's duty to warn was adequately presented to the jury...."

when the court charged it only on negligent failure to warn. This court held the same in Venezia v. Miller Brewing Co., 626 F.2d 188 at 191 (1st Cir. 1980). See also Chestnut v. Ford Motor Company, 445 F.2d 967, 968-969 (4th Cir. 1971), and Rainbow v. Albert Elia Building Co., Inc. 373 N.Y.S. 2d 928 930, 931 (1975).

however. The court only spoke of the advisibility of separate treatment in the context of the application of a negligence defense to a warranty claim. "Separate questions" to a jury were in no way involved, and this court's "can only mean" is a quantum leap without justification. Correia was certified to the Supreme Judicial Court before trial by the United States District Corut for the District of Massachusetts. As has been shown, Hayes destroyed any such reading of Correia anyway, but the case is not authority for the "error" this court devined in Judge Tauro's unitary presentation of the "common factual issue" of failure to warn.

Lastly, it is relevant to this issue to note that the underlying finding by the court which is its premise for a new trial has also been accepted for the sake of demonstrating that

affirmance is required nonethless, but that premise is directly contrary to an opposite finding of Judge Tauro's, and that fundamental conflict is neither mentioned or explained in the court's opinion. The court simply finds, without explication, that "the case was submitted to the jury and decided by it only on negligent failure to warn" (Slip opinion, p. 9), but Judge Tauro detailed in his new trial Memorandum (A. 64; 66-69) that "both negligence and breach of warranty claims" were submitted to the jury (A. 67), concluding: "Independent of counsel's failure to object to the approach taken by the court, the instructions and the interrogatories adequately and fairly presented the contested issues to the jury..." (A. 68-69). The fact that the breach of warranty claim was submitted to the jury was the focus of the post-trial motion, for it was the basis of URC's attempt to

avoid the impact of Correia. The court had to have also overlooked Judge Tauro's key finding that breach of warranty was submitted to the jury to have based its holding on a finding to the contrary. Otherwise, of course, Judge Tauro's finding was binding on the court unless it could demonstrate that Judge Tauro's finding was, somehow, "clearly erroneous." The court did not assay that task, and, on this record, it would be impossible anyway. If the court determines, somehow, that none of the above three reasons why affirmance is required are compelling, it must resolve this errant premise that the warranty issue was not presented to the jury. Were the court now to adopt Judge Tauro's finding, it would have well-charted an easy course to a Per Curiam affirmance and a burdensome retrial obviated.

2. A new trial is not necessary to afford URC "an opportunity to raise the strict liability defense of misuse."

While any of the four above-delineated reasons (Hayes, concession, waiver or jury verdict) demonstrates that URC's breach of warranty liability must be affirmed, there remains to be dispelled the court's alternative holding that a new trial must be had: to give URC "an opportunity to raise the strict liability defense of misuse." (Slip Opinion, p. 12). "Misuse" could, theoretically, still avoid liability for breach of warranty. The court's alternative "misuse" holding, however, must be legally viable, not a gratuitous rescue of URC. This "misuse" holding is also grounded on either an oversight or a misapprehension, however.

Correia is, again, the court's lone authority for the very narrow "misuse" exception to implied warranty liability which, the plaintiff will admit, survives

Correia's excision of the contributory negligence defense. As this court's opinion correctly recognizes, Correia came to light in this case after the trial. While the court's opinion does not explain how it reaches it conclusion (two sentences after quoting from Correia) that URC must now be "given an opportunity to raise... misuse", the only possible reason to so conclude is that the court thought that the "misuse defense" was another precept of new law promulgated by Correia, post-trial. Otherwise, of course, URC would have had "an opportunity to raise the...defense of misuse" in several ways during the trial, just as would any other defendant have had the "opportunity to raise" any existing defense. But the "defense of misuse" was not promulgated by Correia, it was a well-established part of the law of Massachusetts long before trial. URC had every "opportunity to raise" it. The court must have

misapprehended the provenance of "misuse." The leading Massachusetts "misuse" case is Back v. Wickes, 375 Mass. 633, 378 N.E. 2d 964 (1978)--five years before the trial of this case, and it is in fact cited in a footnote in Correia, which appears after the first sentence of the quotation from the opinon on page 12 of this court's slip opinion. Neither the existence nor the contents of the footnote appears in the court's quotation, however. It must have been overlooked. "Misuse" was also an issue in Uloth v. City Tank Corp., 376 Mass. 874, 384 N.E. 2d 1188 (1978), and in this court's opinion in Venezia v. Miller Brewing Co., 626 F.2d 188 (1st Cir. 1980), also years before trial. URC is well-aware that the "misuse" defense was well-established before Correia. The court overlooks the fact that URC cites Back, Uloth and Venezia in its brief in chief when it argues "misuse." URC's

brief, if not the Correia footnote, should, therefore, have alerted the court to the fact that the"misuse" defense was well-established before trial. URC did not argue in its brief that it had had no "opportunity to raise...misuse", as is now conjured by the court, because it was impossible to so contend. URC could proffer no excuse. It had its opportunity. But there is an even simpler and more dispositive reason URC dared not argue the court's "no opportunity" construct, and why it is unavailable to justify a new trial. Not only is it clear that URC had the "opportunity" to raise "misuse" at trial and is not now entitled to a "second bite of the apple", URC in fact did "raise" "misuse" during the trial--and then waived it. The court's alternative new trial raison d'etre is non-existent for this second reason: waiver. The 25th of the 30 requests for instructions to the jury

submitted to the trial judge by URC reads as follows:

> "25. The defendant, Universal Resilite, is not liable for the consequences of the unforeseeable misuse of a product nor is is required to guard against bizarre unforeseeable accidents. Back, supra, Et. [sic; ? "at"] 1882, 1883."[8]

URC then never argued "misuse", and when Judge Tauro did not instruct the jury on "misuse", as URC had requested (A. 1016-1036), counsel for URC made no objection nor did it bring the matter to the trial court's attention in any way.[9] Having clearly waived the "misuse" defense at

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[8] URC's requests for instruction are not a part of the joint record on appeal herein, because until now neither party considered that they were in any way relevant, but, to corroborate the fact that URC's request #25 does read as is set out, plaintiff attaches hereto a copy of page 18 of URC's Requests for Instructions, and asks that the record be supplemented to that extent.

[9] Plaintiff's counsel and three of the four defense counsel specified several objections after Judge Tauro's charge to the jury (A. 1036-1045), but the only thing said by counsel for URC was, "I am content." (A. 1043).

trial, URC did not raise it in its memorandum or arguments on the post-trial motions. When this court interjects the "misuse" issue into its opinion, pg. 12, the court observes that Judge Tauro "did not address the misuse aspect of breach of warranty" "[i]n ordering a new trial limited to damages." He did not because URC never presented "the misuse aspect", or if, technically, "presented" among its requests, URC then waived it by failing to mention it again--ineluctably waived it in the trial court. URC did argue "misuse" in its brief in chief (Ps. 16-19), and this court seizes upon "misuse" as a reason to grant URC a new trial, but the court holds up a chimera--it simply cannot do that. The court cannot ignore patent waiver to rescue any party. This court has made that very clear many times. The court "will not reverse a judgment of the district court on a ground not urged upon

or considered by it." Dobb v. Baker, 505 F.2d 1041, at 1044 (1st Cir. 1974), when no objection on some issue was raised below that "precluded consideration of this issue," McKinnon v. Skil Corp., 638 F.2d 270 at 273 (1st Cir. 1981), and all this was, years ago, "by now axiomatic." Johnson v. Holiday Inns, Inc. 595 F.2d 890 at 894 (1st Cir. 1979). The court cannot now ignore its own established edicts and gratuitiously grant URC the boon of a new trial--"an opportunity to raise the... defense of misuse" which it, patently, waived.

Lastly, both the evidence and the jury verdict have substantively removed "misuse" from this case as a matter of law. The "defense of misuse" is a very narrow exception to breach of warranty liability. This court well-explicated "the linchpin" of "misuse" in Massachusetts warranty law in Venezia v. Miller Brewing Co., 626 F.2d

188 (1st Cir. 1980): even if the "misuse" is "deliberate", if it was "foreseeable", the defendant is not relieved of its liability--there must be "purposeful abuse" by the plaintiff which is not a "foreseeable 'misuse'" without defendant's ken, such as smashing a beer bottle against a telephone pole, as in Venezia. (Correia, quoted on page 12 of the court's slip opinion, speaks of "after discovering the product's defect and being made aware of its danger....") Here the weight machine was simply being used for its "intended use", its "normal and expected use", as the court put it in Venezia, and the evidence is uncontradicted that Dr. Brenner was totally unaware at all times that a counterfeit defective selector pin sat as a hair-trigger which could cause the weights to smash her hand if she touched it. Equally dispositive is the fact that URC had specifically foreseen

that "only Universal [selector] keys", "FULLY INSERTED AND LOCKED" (caps in original), should be used in the machine, because "substitutes may cause weights to fall unexpectedly", so "KEEP HEAD AND LIMBS CLEAR (caps in original) of weights and moving parts at all times."[10] In DeMedeiros v. Koehring Co., 709 F.2d 734 (1st Cir. 1983), the court recognized (page 738) that for there to be any "misuse" there must be "an obviously dangerous machine", a "risk... patently obvious", and the evidence here demonstrates that this is not such a case. The jury, in fact, so found, because, per the court's instructions, they could only have returned the verdict that there was a "failure to warn" (A. 53) if "...Dr. Brenner...prove[d]" that URC knew that

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10 Those quotes are from page 3 of the Exhibit 26 "WARNING" (A. 1161), admitted against URC, a copy of which is attached hereto.

there was a "danger in using this machine with counterfeit pins", and "had reason to believe that a warning was needed" of that danger, and "that she was ignorant of that danger" (A. 1027-1028). "Misuse" was proven a "nonissue" in this case; both elements were eliminated: Dr. Brenner was "ignorant" of the danger, but URC had foreseen it.[11]

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[11] A final caution about the "defense of misuse": the court seems to consider it as somehow related to contributory negligence ("that the jury finding of contributory negligence was [maybe] based on misuse" [Slip opinion, p. 12]), but that is a misapprehension. "Misuse" is a defense different in kind from contributory negligence. For one thing, the "foreseeability" of the danger by a defendant--its reason to perceive a "foreseeable 'misuse' incident to or arising out of the product's intended use", as this court put it in Venzia, at 190--has nothing whatsoever to do with a plaintiff's contributory negligence. Even a "100% contributorily negligent" plaintiff (Slip ipinion, p. 10) could win a breach of warranty action if such negligence was foreseeable by the defendant. A defendant relying on "misuse" as a defense must prove the element of its own ignorance--something foreign to contributory negligence. That element is not common to the two defenses--demonstrated by Correia's elimination of contributory negligence from a breach of warranty action, while retaining "the defense of misuse."

It is, therefore, hoped that the court can see that dispositive oversights or misapprehensions lie at the heart of its decision to order a new trial. Any one of four reasons compel an affirmance of URC's liability for breach of warranty, and any one of three reasons remove "misuse" as even a prospective issue in the case. The contents of this petition itself should mandate that the panel withdraw its original opinion and issue a new one affirming the judgment below. The "suggestion" of an in banc rehearing of these issues should be unnecessary--"quod erat demonstrandum. There would, obviously, not be "uniformity of [the court's] decisions," F.R.A.P. 35, if this opinion were let stand. If the panel does not agree, then in banc rehearing is pressed. At the very least, the court should order supplemental briefing on these new issues--for URC to show cause why the court should not

withdraw its opinion and affirm.

By her attorney,

/s/ Daniel F. Featherston, Jr.

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141 Tremont Street
Boston, MA 02111
426-4766

DATED: December 3, 1984

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 84-1382

LEONA BRENNER,
Plaintiff, Appellee

V.

PRESIDENT AND FELLOWS OF HARVARD
COLLEGE, ET AL,
Defendants, Appellees

UNIVERSAL-RESILITE COMPANY,
Defendant, Appellant

NO. 84-1393

LEONA BRENNER,
Plaintiff, Appellant,

V.

PRESIDENT AND FELLOWS OF HARVARD
COLLEGE, ET AL
Defendants, Appellees

APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(Hon. Joseph L. Tauro, U.S. District Judge)

BEFORE
Bownes, Circuit Judge,
Aldrich and Skelton,* Senior Circuit Judges

*Of the Federal Circuit, sitting by designation

Donald J. Wood, with whom Richard J. Riley and Murphy & Mitchell, were on brief, for Universal-Resilite Company

Daniel F. Featherston, Jr., with whom Susan S. Riedel, was on brief, for Leona Brenner.

Craig M. Brown, with whom Richard J. Shea, and Melick & Porter, were on brief, for appellees.

November 19, 1984

BOWNES, Circuit Judge. Plaintiff appellee-appellant Leona Brenner was injured when weights which were part of a Universal Gym exercise machine owned by Harvard Medical School dropped on her right hand. Brenner brought a diversity action against Harvard, the Universal-Resilite Corporation (URC), distributor of Universal Gym machines and the one who sold the machine to Harvard, Whittaker Corporation, the manufacturer of the machine involved in the accident, and Universal Gym Equipment Company (UGEC), successor corporation to Whittaker and current manufacturer of the machine.

THE FACTS

In order to understand how the accident happened, a description of how the Universal Gym works is necessary. The machine is designed for lifting weights with the exerciser in different body positions. We tailor our description to the part of the machine involved in the accident, the bench press station, where the exerciser lies on his or her back and pushes the weights up. This station may be divided into three separate parts: a bench and metal handelbars above it, an adjustable set of weights, and a metal shaft connecting the handlebars to the weights. The station operates by using the metal shaft to transfer the up-and-down motion of a person pushing against the handlebars to raise and lower the weights. The weights are located approximately a foot beyond the handlebars. Since the

weights are raised with the exercisor lying face up on the bench, it is necessary to sit up and turn around to adjust the weights.

The weights themselves are flat rectangular metal plates; they are stacked vertically one upon the other. Each plate has three holes running through it. The holes are flush with each other so that a rod may pass through the entire stack. The rods passing through the two outside holes are stationary; their function is to maintain the position and alignment of the stack of weight plates. The third rod runs through the center hole and is connected to the handlebars by the metal shaft. The function of this rod is to lift the number of plates that have been selected for the exercise to be performed. Since the focus of this case is on the lifting of the weight plates selected for the exercise, the selection mechanism must be examined in detail.

The center, or selector, rod has horizontal holes in it, each of which is aligned with a groove in the bottom of each weight plate. The purpose of the groove in the bottom of the weight plate and the hole in the selector rod is to allow the insertion of a metal pin, called the selector key, into the groove of the bottom plate of the weights to be lifted and then into the corresponding hole in the selector rod. The selector key that comes with the Universal Gym machine has a hump or knuckle in the middle to prevent the key from slipping out of the hole in the selector rod. The key is inserted into the groove of the weight plate and the hole in the selector rod so that the knuckle sticks out sideways. After the key is fully inserted, it is twisted so as to bring the knuckle to the vertical. The groove in the weight plate has a recess into which the knuckle of the key fits when it is at the vertical position.

When the key is in the vertical position, the knuckle acts as a latch and the key cannot be pulled out without first twisting it back to horizontal, with the knuckle sideways. After the desired number of weight plates have been chosen and the selector key properly inserted, the key and every plate above it will be lifted by the selector rod when the handlebar is pushed.

For a considerable period of time prior to the accident, the selector key that originally came with the Universal Gym had been missing. Harvard, through one of its maintenance crew, made a substitute after the original key disappeared. The substitute key was a straight metal pin which fitting the weight plate groove and the selector rod hole. It did not, however, have a locking knuckle as did the original selector key.

On the day of the accident, Brenner, a student at Harvard Medical School, went to

the room where the Universal Gym machine was located. She was accompanied by another student, Gerry Aurigemma. Aurigemma started to exercise on the machine while Brenner played a piano that was in the room. As Aurigemma exercised, he had trouble getting the desired number of weights to raise and lower properly. He asked Brenner to come over and help him. Brenner had never used the weight machine and had never seen anyone else use it. From here on, the facts are less than crystal clear but looking at them in the light most favorable to the plaintiff, the following sequence of events could be found to have occurred. After Brenner got to the machine, Aurigemma lifted the weights so that she could look at the key. Brenner crouched down and observed that the key was not flush with the weight plate, but angled downwards. She testified, "I reached under to twist the pin and the next thing I knew the weights came crashing down on my hand." Her hand was pinned

between the weights that had fallen on it and the bottom stack of weights.

There was no warning on the machine relative to using only keys with a locking knuckle or the proper method of adjusting weight loads.

Further facts will be developed in the discussion of specific issues.

PROCEDURAL HISTORY

A somewhat detailed explanation of the procedural history of the case is necessary to understand the issues on appeal. The case was submitted to the jury on special questions. The liability questions as to URC, Whittaker, and UGEC were identical:

> 1) Has the plaintiff proved by a preponderance of the evidence that the defendant was negligent in failing to give adequate warning concerning the use of non-Universal pins with the Universal exercise machine that has been the subject of this litigation?

The plaintiff had proceeded against these

defendants on two theories, negligent failure to warn and breach of implied warranty. The Massachusetts law of implied warranty is "congruent in nearly all respects" with the principles of strick liability "expressed in Restatement (Second) of Torts §40A (1965)." Back v. The Wickes Corporation 378 N.E. 2d 964, 969 (Mass. 1978).

In discussing the case prior to argument and charge, the district court advised counsel that the case would be submitted to the jury on both negligent failure to warn and breach of implied warranty but that his instructions would "just focus their attention on the reasonableness of the warning because I think that is my function, rather than give them a lecture on the law of implied warranty of merchantibility." No objections were taken to this statement, to the jury instructions on liability, or to the liability questions submitted to the jury.

The jury found URC liable; Whittaker and UGEC were found not liable. The jury further found plaintiff was contributorily negligent to the degree of 95% and that $5,000 "would fully and fairly compensate plaintiff for any past, present and future damage."

Four questions were submitted to the jury on Harvard's liability:

> 1) Has the plaintiff established by a preponderance of the evidence that Harvard was negligent in altering the Universal machine that is the subject of this litigation?
>
> 2) Has the plaintiff established by a preponderance of the evidence that Harvard was negligent when it allowed its students to use the Universal machine that is the subject of this litigation?
>
> 3) Has the plaintiff established by a preponderance of the evidence that Harvard was negligent in supervising and providing instructions as to the use of the Universal machine that is the subject of this litigation?

> 4) Has the plaintiff established by a preponderance of the evidence that Harvard was negligent in failing to give adequate warning to its students concerning the use of non-Universal pins with the Universal machine that is the subject of this litigation?

The jury answered "yes" to questions 1, 2 and 4 and "no" to question 3. It found, as it did in the case against URC, that the plaintiff was 95% contributorily negligent.

The court and the parties assumed that the findings on contributory negligence barred any recovery from Harvard and URC Mass. Gen. Laws Ann. ch. 231, §85. The plaintiff then learned that on the second day of trial the Massachusetts Supreme Judicial Court had issued an opinion holding, in answer to a question certified by the United States District Court of Massachusetts, that comparative or contributory negligence was not a full or partial defense in a breach of warranty

action. Correia v. Firestone Tire and Rubber Company, 446 N.E. 2d 1033, 1039-41 (Mass. 1983). Plaintiff moved for a new trial on the fround that under Correia she was entitled to recover from URC on her breach of implied warranty theory. She also moved for a new trial on the grounds of inadequate damages and that the findings on contributory negligence were against the weight of the evidence. The district court ruled that URC was liable as a matter of law on breach of implied warranty to warn. Finding that the award of $5,000 wad inadequate, the court ordered a new trial limited to the issues of damages. It denied plaintiff's motion for a new trial as to the other defendants. The plaintiff and URC agreed to a jury-waived trial on damages; the court awarded plaintiff $175,000.

URC raises the following issues: that it was inconsistent to find it liable on

implied warranty and find Whittaker not liable; that the failure to warn was not the proximate cause of the plaintiff's injury; that plaintiff's misuse of the machine negates any failure to warn; that plaintiff is barred from recovering because she used the machine in a manner which she knew was dangerous; and the verdict was a compromise requiring a new trial on both liability and damages.

Brenner appeals on two grounds: there was no evidentiary basis for the jury's finding of contributory negligence in her case against Harvard and the district court erred in directing a verdict for URC on her claim of negligent inspection and repair.

Still waiting in the wings is URC's indemnity action against Whittaker. Neither Whittaker nor UGEC have filed briefs.

THE PROCEEDINGS BELOW

We start our analysis by noting that Correia, which is binding on us, decided more than that a recovery by the plaintiff on breach of implied warranty shall not be reduced by the degree of plaintiff's contributory negligence. It also held that under the law of Massachusetts, negligence and strict liability are two entirely separate concepts and the "policies of negligence and warranty will best be served by keeping the spheres in which they operate separate...." Correia, 446 N.E. 2d at 1040.

As far as the case by the plaintiff against URC is concerned, we are, therefore, faced with two distinct and separate theories of liability, negligent failure to warn and breach of implied warranty. And, despite the intentions of the district court, the case was submitted to the jury and decided by it only on negligent failure to warn.

We must analyze the jury verdict as to URC as well as Harvard, therefore, within the framework of negligence law.

The jury answers on the negligent liability claims are clear, consistent, and supported by the evidence. It found URC negligent for failing to give adequate warning concerning the use of non-Universal pins. Its failure to find Whittaker and/or UGEC liable on the same basis reflects the evidence that neither Whittaker nor UGEC had any dealings with Harvard and that URC was the one responsible for the maintenance of the machine. Nor can there be any basis for faulting the jury finding "that Harvard was negligent in altering the Universal machine."

We also find the jury's determination that plaintiff was negligent to the degree of 95% to have a sound evidentiary foundation. We cannot agree with plaintiff's contention that she had to know the pin was defective in order

to know she was putting her hand in a place of great danger in the event that something went wrong. There was evidence from which it could be found that the plaintiff made two prior attempts to fix the weight plates before the one that resulted in her injury. The jury could have found that plaintiff knew something was wrong and should not have persisted in exposing her hand to the danger of the weights falling on it. Moreover, since plaintiff knew nothing about the machine, it could be found that she should have been extra cautious under the circumstances. In fact, the evidence would have sustained a finding that plaintiff was 100% contributorily negligent. The degree of plaintiff's own negligence was a question of credibility and judgment, a classic jury issue.

The effect of the jury finding of 95% contributory negligence was that neither URC nor Harvard were liable to the plaintiff.

The only question that can be raised as to the verdict is not the liability findings, but whether the totally inadequate damage award of $5,000 indicated a compromise on liability. URC contends that the jury found it free from fault and the plaintiff wholly to blame but wishing to reimburse the plaintiff for her medical expenses compromised by finding her 95% contributorily negligent. Plaintiff argues that this was not a compromise verdict, that the jury determined the actual damages to be $100,000 and then deducted 95% to reflect its finding on contributory negligence. There is a third possibility, the jury understood full well the instructions and questions on damages and decided that $5,000 was the full measure of plaintiff's damages.

Both the reduction theory and the full award theory are anchored to the 95% contributory negligence finding which has a firm evidentiary basis. Neither of these

theories, therefore, afford any reason for setting aside the negligence verdict resulting in no liability. If there was a compromise on liability, it was that the jury reduced plaintiff's liability from 100% to 95% in order to award her $5,000. This is not the type of compromise that requires a new trial on liability. The damage award was under any scenario a nullity.

The issue, therefore, is not whether the jury's damage award requires a new trial, but whether it was error for the district court to find that there was a breach of implied warranty by URC on the basis of the jury negligence findings. There are two problems with the district Court's approach. First, it ignored Correia's admonition that negligence and implied warranty should be treated separately. This can only mean that in a case involving negligent failure to warn and breach of implied warranty, the jury must be instructed

on both theories and separate questions on each theory submitted to them. Secondly, the court erred in assuming that because URC had been found liable for negligent failure to warn, it was automatically liable for breach of implied warranty. Under Correia a plaintiff in a breach of implied warranty action

> may not recover if it is found that, after discovering the product's defect and being made aware of its danger, he nevertheless proceeded unreasonably to make use of the product and was injured by it. No recovery by the plaintiff shall be diminished on account of any other conduct which might be deemed contributorily negligent.

446 N.E. 2d at 1039 (footnote omitted). In ordering a new trial limited to damages, the district court did not address the misuse aspect of breach of implied warranty. It either assumed that the jury finding of contributory negligence was not based on misuse or simply overlooked that part of the Correia opinion. In either event, URC

was not given an opportunity to raise the strict liability defense of misuse.

It is essential to distinguish between the defect and danger involved in the use of counterfeit pins and misuse. If the plaintiff's contributory negligence was merely placing her hand under the weights which fell because of the use of the defective pin, then, under Correia, this would not bar recovery under implied warranty/strict liability. There was evidence, however, from which it could be found that before the weights fell the plaintiff twisted the pin. If the plaintiff knew the pin was not locked securely to the weights and was likely to fall out and nevertheless twisted the pin, this would constitute misuse. The misuse also might have consisted of twisting the pin while the weights were engaged, a dangerous practice regardless of the type of pin involved. Since we cannot know what the

jury had in mind when it made its finding of contributory negligence, there must be a new trial between the plaintiff and URC on breach of implied warranty.

THE DIRECTED VERDICT

The only other issue of significance is whether the district court erred in directing a verdict for URC on the question of negligent inspection and repair of the Universal Gym. Our standard of review is clear:

> Under Massachusetts law, the role of the reviewing court is limited to determining whether, viewing the evidence in the light most favorable to the plaintiffs, there was any combination of circumstances from which a rational inference may have been drawn in favor of the plaintiff. See Uloth v. City Tank Corp., 376 Mass. 874, 876, 384 N.E. 2d 1188, 1190 (1978); Stewart v. Roy Bros., 358 Mass. 446, 448, 265 N.E.2d 357, 359 (1970).

DeMedeiros v. Koehring Co., 709 F.2d 734, 737 (1st Cir. 1983).

A. The Facts

The facts so viewed are as follows. All of Harvard's dealings pertaining to service of the Gym machine were with URC. Communication between Harvard and URC was exclusively by purchase orders from Harvard to URC for work requested on the machine. URC hired a service technician, Robert Charron, as an independent contractor to do the work Harvard requested. Harvard was never informed that the maintenance and repair work was being done by an independent contractor. The work done by Charron was carried out in other geographic areas by payroll employees of URC.

URC understood that the work done by Charron "[included] more than just wielding the paint brush and oil can." Charron was hired by URC because of "reputable business." URC went over the machine with him so that he was well versed in its maintenance and repair.

In late 1978 Robert Charron's brother Lucien took over the service contract. Lucien's training came from Robert. He received no formal training or instructions from URC or Harvard. He admitted that his business card referring to him as a factory trained expert in Universal machines was not true.

It was Lucien's custom when he arrived to service a machine to "just walk in and say 'I'm here from Universal Resilite and here to service your Universal weight machine'." Lucien sent invoices to URC for labor plus a percentage of the parts; the customers were billed by URC. Charron testified that it was his normal practice to check the selector keys during a service call and if they were substitute keys, "I just point out that they should not have those things in there when I see it" because, "its not the right tool, its probably unsafe." He stated further that a substitute key does not

work as well as the Universal one because it didn't have the "hook to it, the kunckle," and "it would be apt to fall out." Charron also testified that the purpose of the knuckle in the Universal key is to lock the key in place.

On February 5, 1979, four days before the accident, Lucien Charron and his son went to Harvard to fill a service order Harvard had requested by purchase order from URC: reconditioning of the machine, cables and pulleys, and supplying an abdominal board, booklets and charts. Harvard did not request any selector keys. Charron was unable to remember whether he checked Harvard's selector keys. He did, however, remember talking to a Harvard custodian.

William Medeiros, supervisor of the Harvard janitorial crew that worked in the building where the machine was located, testified that in February of 1979 two maintenance men, appearing to be father

and son, came to service the machine. Medeiros pointed out to the men that the selector keys being used were ones he had made and not Universal selector keys. The men responded, "they do the same thing as the other pins" and "we only supply what's on the order." Charron had with him a form on which he could list items that Harvard needed for the proper operation of the machine; selector keys were not listed by him on the form.

B. The Law

While Massachusetts law follows the rule set out in the Restatement (Second) of Torts §409, that, generally, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants, it is equally well recognized in Massachusetts that there are several exceptions to the rule. Fergusen v. Ashkenazy, 29 N.E.2d 828, 830 (1940); Whalen v. Shivek, 93 N.E.

2d 393, 398 (1950). It has been said that the general rule is now primarily important as a preamble to the catalog of its exceptions. Whalen, 93 N.E.2d at 398; Comment b, Restatement (Second) of Torts §409.

The Restatement (Second) of Torts lists nineteen exceptions to the general rule in sections 410-429. As summarized by the commentators, exceptions fall into three broad categories:

> 1. Negligence of the employer in selecting, instructing, or supervising the contractor.
>
> 2. Non-delegable duties of the employer, arising out of some relation toward the public or the particular plaintiff.
>
> 3. Work which is specifically peculiarly, or "inherently" dangerous.

Comment b, Restatement (Second) or Torts §409.

Consistent with the enumerated theories of the Restatement, an employer in Massachusetts remains liable for acts committed or omitted by an independent

contractor. The imposition of vicarious liability on the employer who fails to take reasonable precautions in the performance of inherently dangerous work is well established. See Fergusen v. Ashkenazy, 29 N.E. 2d 828 (1940); Whalen v. Shivek, 93 N.E.2d 393 (1950); American Coated Fabrics Co. v. Berkshire Apparel Corp., 279 N.E.2d 695 (1972).

Negligence in the selection and/or instruction of an independent contractor will likewise impose liability upon an employer for physical harm to third persons caused by the contractor. In Posner v. St. Paul's Trucking Service, 380 F.2d 757 (1st Cir. 1967), applying Massachusetts law, where an employer of an independent contractor directed the truck driver to drive twenty-four hours without relief, we imposed liability upon the employer for the resulting accident caused by the driver's falling asleep at the wheel. See also Restatement (Second) or Torts §410.

When determining the liability of an employer for acts or omissions of an independent contractor, the courts will look to whether the defendant was negligent in selecting the company or individual to do the work or in making the employment contract. Ferguson v. Ashkenazy, 29 N.E. 2d at 830; Pickett v. Waldorf System, Inc., 136 N.E. 64, 65 (1922); Restatement (Second) of Torts §411.

Liability of an employer of an independent contractor may additionally ensue from a failure to inspect the work of a contractor after its completion and/or from duties arising out of the possession of property. Mulchey v. Methodist Religious Society, 125 Mass. 487 (1878); Restatement (Second) of Torts §§412, 422. Similarly, the Massachusetts Court has ruled that the duties assumed by lessors may be sufficient to overcome the general rule negating liability for negligence of an independent

contractor. Banaghan v. Dewey, 162 N.E.2d 807 (1959); Restatement (Second) of Torts §419.

While not covering every possible exception to the general rule listed in the Restatement (Second) of Torts, the Massachusetts cases indicate consistent acceptance and application of the principles expressed in the Restatement relating to liability for acts and omissions of independent contractors.

Under the facts here, there were two grounds for finding URC negligent. It could have been found negligent in its selection, instruction or supervision of the independent contractor and additionally, or alternatively, it could have been found liable under §429 of the Restatement because Harvard believed that URC was directly responsible for the maintenance and service work. As stated in §429:

> One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

In order that the rule stated in §429 may apply, it is not necessary that the person who was injured have himself accepted the services in the belief that they are being rendered by the employer, rather than the independent contractor. If Harvard believed that the services to the weight machine were rendered by URC, URC is responsible for all injuries incurred as a result of the negligence of its independent contractor. See Comments a & b, Restatement (Second) of Torts §429.

In Gobern v. Metals & Controls, Inc., 418 F.2d 290, 294 (1st Cir. 1969), we stated that it has long been recognized that

the exercise of reasonable care in an inspection depends upon the nature of the apparatus and the use to which it is subjected. Where a threaded aluminum bolt was used by the defendant in place of the steel pin that came with the original staging equipment, we held that whether the defect could have been discovered and remedied upon a reasonable inspection, and whether the defendant's failure to so inspect was the proximate cause of an ensuing accident were issues of fact properly submitted to the jury. In an analogous case, Power Service Supply, Inc. v. E. W. Wiggins Airways, Inc., 399 N.E. 2d 878 (1980), a suit arising out of the crash of plaintiff's helicopter, the Massachusetts Appellate Court reversed the trial judge's direction of a verdict on negligent inspection and repair and held that the evidence warranted submission of

the claim to the jury. The evidence had shown that the crash was caused by the absence of a properly flared cotter pin in the control system of the helicopter, that the defendant had entered into an agreement with the plaintiff to install and replace parts and maintain the helicopter, and that the presence or absence of a cotter pin would be a proper subject of inspection by a mechanic under such a duty.

Viewing the evidence in the instant case in the light most favorable to the plaintiff, the jury could have found that the serviceman retained by URC not only failed to take the admittedly unsafe key out of the machine in accord with proper procedure, but stated incorrectly that the key was an appropriate substitute for the one furnished by URC. In addition, there is ample evidence to support a finding that URC was directly negligent in selecting and failing to train

a serviceman who had no prior experience with Universal Gym machines. The scope of a reasonable inspection under the circumstances and whether the accident would have occurred had an adequate inspection taken place were determinations for the jury.

SUMMARY

There must be a new trial against Universal Resilite on breach of implied warranty and plaintiff's claim of negligent inspection and repair. Affirmed as to Harvard.

Remanded for further proceeding in accordance herewith.

Costs to Harvard. No costs to either URC or plaintiff.

CONCURRING OPINION FOLLOWS:

ALDRICH, Senior Circuit Judge (concurring). I do not share the court's feelings on the subject of jury compromise, let alone plaintiff's view that Simmons v. Fish, 210 Mass. 563, 97 N.E. 102 (1912) is

an "embarrassing turkey." (I note that it flew--swam--as a correct recitation of Massachusetts law in Magee v. Lane, 346 Mass. 475, 477, 194 N.E. 2d 393, 394 (1963). See, also, Southern Ry. Co. v. Madden, 235 F.2d 198, 202 (4th Cir. 1956)). Since, however, the court comes out with the same result that I would reach, I need not pursue this matter.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

LEONA BRENNER,	*	
	*	
Plaintiff	*	
	*	
V.	*	
	*	CA 79-1308-T
THE PRESIDENT AND	*	
FELLOWS OF HARVARD	*	
COLLEGE, ET AL,	*	
	*	
Defendants	*	

MEMORANDUM

TAURO, D.J. July 21, 1983

At issue is the plaintiff Leona Brenner's motion for a new trial following a jury verdict with respect to her personal injury claims against several defendants. Brenner, then a medical student at Harvard, was injured when the weights of a Universal Gym machine located in a Harvard dormitory dropped on her right hand. Brenner sued Harvard, the Universal-Resilite Corporation (URC), distributor of the machine, Whittaker Corporation, manufacturer of the

machine, and the Universal Gym Equipment Company, Incorporated (UGEI), a successor corporation to Whittaker, and the current manufacturer of the Universal Gym.

I.

Brenner's theories against Harvard involved alleged negligent alteration of the Gym, as well as failure to adequately warn and supervise. The theories advanced against the other defendants primarily involved allegations that their failure to warn constituted both negligence and breach of an implied warranty of merchantability.

The jury was advised in the court's instructions as to the various theories by which the plaintiff was proceeding. Indeed, the court instructed the jurors that plaintiff was asserting two claims against the non-Harvard defendants.

> **The plaintiff's complaint against...the non-Harvard defendants, is that they...were negligent and breached implied warranties of merchantability by marketing the**

> Universal exercise machine which has been the subject of this litigation without proper warning as to its alleged inherent danger if used with counterfeit, that is, non-Universal selector pins, those pins which are designed to control the setting of the weights of the machine. Tr. p. 37.

At a bench conference prior to the charge, the court informed counsel that it would not go into great detail about the breach of warranty claim, because its elements essentially tracked those involved in the failure to adequately warn claim. In that discussion, the court made it clear that, as to the non-Harvard defendants, plaintiff's case would go to the jury on two legal theories based on a common factual issue as to whether or not adequate warnings had been provided.[1] As the court's jury

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[1] I thought I said that to you yesterday, that the case would go on a breach of warranty, implied warranty of merchantability because of the failure to warn, but that essentially it's the same argument to the jury; in other words, the jury is going to decide: was there reasonable warning or wasn't there reasonable warning. And if you want to go into detail of implied warranty of merchantability with them, that is up to you.

instruction later confirmed, these theories included both negligence and breach of warranty.

The case was submitted to the jury on the basis of special interrogatories. In response to those interrogatories, the jury found no liability on the part of either Whittaker or UGEI, the manufacturer and successor manufacturer. The jury did determine liability existed on Harvard's part for negligently altering the Gym, for allowing students to use the Gym, and for negligently failing to give adequate warning concerning its use. The jury also found URC liable for failing to adequately warn. The jury assessed Brenner's damages to be in the amount of $5,000.00 and found that she had been 95% contributorily

Footnote 1 continued

I intend to just focus their attention on the reasonableness of the warning because I think that is my function, rather than give them a lecture on the law of implied warranty of merchantability. Tr. pp. 14-15.

negligent.

The jury's 95% contributory negligence finding barred any recovery from either Harvard or URC on any theory of negligence. On the occasion of its instructions to the jury (March 24, 1983), the court and counsel were under the mistaken impression that plaintiff would have been similarly barred from recovering on her breach of warranty claim based on failure to adequately warn. In fact, however, on March 9, 1983, the Supreme Judicial Court (SJC) handed down its decision in Correia v. Firestone Tire and Rubber Co., 388 Mass. 342 (1983). In that case, the SJC ruled that Massachusetts does not recognize contributory or comparative negligence as a full or partial defense to an action for personal injury based on breach of warranty. Id. at 353. Correia was controlling at the time of the jury's verdict.

II

Brenner now seeks a new trial against all defendants, asserting a variety of theories in support of her motion. The most compelling of these theories concerns the impact of Correia on the validity of the jury's verdict.

In Correia, the SJC again noted the congruence between the theory of implied warranty under Mass. Gen. Laws c. 106 §§2-314-2-318 and strict liability theory. Id. at 353. As in strict liability, the defenses of contributory or comparative negligence are unavailable under this implied warranty theory. Moreover, this warranty protection extends to products which are improperly or inadequately labelled.

> **A retailer's implied warranty of merchantability of goods not of his manufacture is that they are reasonably suitable for the ordinary uses for which goods of that description are sold when used in accordance with adequate warning and instructions.**

Wolfe v. Ford Motor Co., 386 Mass. 95, 99, 376 N.E.2d 143, 149-150 (1980) quoting Casagrande v. F. W. Woolworth Co., 340 Mass. 552, 555, 165 N.E. 2d 109, 112 (1960).

With respect to URC, plaintiff argues that the jury's finding of inadequate warning amounted to both a finding of negligence and a breach of warranty of merchantability. Building on that premise, plaintiff asserts that, under Correia, the jury's contributory negligence finding does not negate the jury's breach of warranty determination.

In response, URC asserts that the issue of breach of implied warranty of merchantability was never presented to the jury. It points out that the special interrogatories (appendix) spoke only in terms of URC's negligent failure to warn and did not specifically mention the breach of warranty. Further, although acknowledging that the court informed the

jury of plaintiff's breach of warranty allegation, URC takes the position that the court failed to provide detailed instructions with regard to that allegation.

As has been pointed out (See supra p. 2), the court did advise the jury that plaintiff was asserting both negligence and breach of warranty claims against the non-Harvard defendants, including URC. Moreover, at a bench conference prior to the charge (See supra note 1), the court informed counsel that, because of plaintiff's negligence and warranty theories involved the same factual elements, there was no need to burden the jury with unnecessary instructions. See United States v. Silvio DeWolfe, 696 F.2d 1, 4 (1st Cir. 1982). There was no objection to this approach, or the subsequent jury instructions on that point, by any counsel. Indeed, there were no objections to the special interrogatories.

URC is correct in asserting that the special interrogatories did not explicitly ask the jurors whether URC had breached an implied warranty of merchantability. But, the interrogatories reflected the general approach adopted by the court and accepted by counsel. The jurors were not asked to distinguish between the legal theories of negligence and aimplied warranty. Rather, the jurors were asked to focus on the factual question of whether or not URC had failed to adequately warn users of the Universal Gym.

It is well settled that a district court has a great deal of discretion in submitting and framing written questions to the jury. Central Progressive Bank v. Fireman's Fund Ins. Co., 658 F.2d 377, 381 (5th Cir. 1981); See Perzinski v. Chevron Chemical Co., 503 F.2d 654, 660 (7th Cir. 1974). In the Central Progressive Bank case, the Fifth Circuit adopted three criteria for reviewing the adequacy of such questions.

> "(i) whether, when read as a whole and in conjunction with the general charge the interrogatories adequately presented the contested issues to the jury,....(ii) whether the submission of the issues to the jury was 'fair',.... and (iii) whether the 'ultimate questions of fact' were clearly submitted to the jury."

Id. at 381 quoting, Dreiling v. General Electric Co., 511 F.2d 768, 774 (5th Cir. 1975).

These criteria have been met here. Certainly, the breach of warranty claim could have been discussed independently and explicitly. But, at the time, no objections were raised to the court's determination that independent instruction on the warranty issue was unnecessary. Moreover, no objection on that point was raised with respect to either the court's instructions or the interrogatories submitted to the jury.[2] Independent of counsel's failure

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[2] If as URC claims, the breach of warranty question was never presented to the jury, then under Rule 49(a) of the Federal Rules of Civil Procedure, having failed to object, the parties waived their right to a jury trial on the issue, and the court will be deemed to have made a ruling in accord with the other jury findings. The only possible

to object to the approach taken by the court, the instructions and the interrogatories adequately and fairly presented the contested issues to the jury, and gave them the opportunity to consider the most critical factual issue at stake--the adequacy of warnings.

III

The remaining arguments raised by Brenner also warrant some discussion.

A. Brenner claims that the jury's decision as to the other two non-Harvard defendants, Whittaker and UGEI, was tainted by their consideration of contributory negligence. In a variant of the argument raised against URC, Brenner contends that, in

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Footnote 2 continued

consistent ruling would be to find URC liable both in negligence and breach of warranty for failing to warn. Still, the jury was instructed on breach of warranty as well as negligence and made the crucial finding of liability for failure to warn so that the court need not take this alternative approach.

light of the Correia case, the jury should not have even considered the possibility of contributory negligence as a defense to the breach of implied warranty allegation.

Brenner's premise has no factual basis. The structure of the interrogatories first focused the jurors' attention on liability, independent of any question of possible contributory negligence. After answering the first interrogatory in the negative, the jurors, as instructed, left the remaining interrogatories unanswered. It is clear, therefore, that they did not consider the issue of contributory negligence in the Whittaker and UGEI cases.

B. Also without merit is Brenner's claim that the jury could not reasonably have found URC liable and, at the same time, there was evidence to support the jury's independent assessments. The evidence as to URC's knowledge of the potential danger of using non-Universal keys was far

stronger than that offered against either UGEI or Whittaker. Moreover, the jury could have based its liability finding on the evidence of URC's ineffectual attempts to supply warnings to users of their machines.

C. As to Harvard and URC, Brenner argues that a finding of 95% contributory negligence is against the weight of legally sufficient evidence and so should be set aside. While the jury's evaluation of the evidence concerning Brenner's own conduct was harsh, their decision did not amount to a miscarriage of justice.[3]

D. Brenner next contends that she ought to have been allowed to offer rebuttal evidence to meet defendants' evidence that

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[3] It is important to keep in mind that a motion for a new trial based on insufficiency of legal evidence may be granted only where to do otherwise would create a "miscarriage of justice." Robinson v. Watts Detective Agency, 685 F.2d 729, 740 (1st Cir. 1982).

it would be unsafe to attach selector keys to the Gym with a chain. Her offer of proof involved her own observation that New York University (NYU) uses chains to attach selector keys to their Universal Gyms. The court refused to allow such rebuttal testimony because Brenner's asserted observation was not probative as to the safety issue. She was not qualified as an expert on the subject of safety. Indeed, the testimony was that she had no prior experience with the Universal machine. There was, however, expert testimony to the effect that the designers of the Universal Gym considered and rejected as unsafe the notion of attaching the keys with chains. Had plaintiff offered the testimony of an expert to support her theory, such evidence might have been admitted.

E. Brenner asserts that the court erred in directing a verdict as to her claim against

URC of negligent inspection. Evidence at trial demonstrated that URC, through an agent, performed specific maintenance on the machines at the request of Harvard. That maintenance was unrelated to safety and involved painting the weight stacks and repairing torn seat covers. In view of URC's limited maintenance responsibility, Brenner failed to make out a prima facie case of negligent inspection.

F. Brenner contends that it was error for the court not to instruct the jury that a finding of more than 50% contributory negligence would result in the plaintiff receiving no award. She is wrong for two reasons. Although such an instruction was requested, no objection was registered to the court's failure to so instruct. Moreover, plaintiff cites no authority for its assertion that such an instruction was required, and this court is aware of none.

IV

Brenner asserts that the jury's $5,000.00 award does not fully or fairly compensate her for the injuries she sustained. Given the jury's finding of contributory negligence, that argument has no relevance with respect to her negligence claims. But, in view of the court's determination that, under Correia, Brenner was successful in her breach of warranty claim against URC, the adequacy of the damage award requires examination.

Brenner suffered serious injury as a result of her accident. She sustained fractures of her thumb, index finger, and middle finger. The tip of her middle finger was very nearly amputated by the force of the blow from the falling weights. A metal wire was inserted through the nearly severed tip and into the rest of the finger in order to prevent its loss.

She suffered severe pain and significant discomfort for a consideration period of

time. These injuries were to her major hand, and required her to relearn basic skills such as writing, eating, bathing and dressing. Her injury has long-term and permanently disabling effects. She has an increased likelihood of developing arthritis in her injured fingers. She will never regain full use of her index finger. Many of the activities which she engaged in prior to the accident, particularly piano playing, are simply impossible for her to perform. Of particular significance, as well, is that her medical expenses approximate $5,000.00, the amount of the jury award.

Ordinarily, the court will not disturb a jury determination of a damage award. But when such an award constitutes a miscarriage of justice, a new trial is mandated. It is clear that the jury did nothing more than award Brenner her medical expenses, ignoring completely the compelling and overwhelming

evidence concerning pain, disability and disfigurement. It would be a miscarriage of justice to permit such a grossly inadequate award to stand.

The court, therefore, orders that a new trial be held to determine the appropriate amount of damages to which Brenner is entitled to recover from the Universal-Resilite Corporation.[4] Her motion for a new trial is otherwise denied.

An order will issue.

Joseph L. Tauro
United States District Judge

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[4] Brenner suggests that the court use its additur powers and simply award a fair amount of damages. While this route is an attractive one from the standpoint of judicial economy, additur is inappropriate where the correct amount of damages is in dispute. See DeCato v. Travelers Insurance Co., 379 F.2d 796 (1st Cir. 1967).

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

LEONA BRENNER,	*	
	*	
Plaintiff	*	
	*	
v.	*	
	*	CA 79-1308-T
THE PRESIDENT AND	*	
FELLOWS OF HARVARD	*	
COLLEGE, ET AL,	*	
	*	
Defendants	*	

ORDER

TARUO, D.J. July 21, 1983

For the reasons stated in a memorandum issued this date, the court orders that a new trial be held to determine the appropriate amount of damages to which the plaintiff, Leona Brenner is entitled to recover from the Universal-Resilite Corporation. Her motion for a new trial is otherwise denied.

It is so ORDERED.

/s/ Joseph L. Tauro
United States District Judge